TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 748

FORD MOTOR COMPANY, PETITIONER,

vs.

TOM L. BEAUCHAMP, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 15, 1939.

CERTIORARI GRANTED APRIL 3, 1939.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 28, 1939.

[fols. a-1] [Captions omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

At Law. No. 1409

FORD MOTOR COMPANY

vs.

R. B. STANFORD, Secretary of State, et al.

FIRST AMENDED ORIGINAL PETITION—Filed July 12, 1937

Leave of Court being first had and obtained, comes now plaintiff, Ford Motor Company, and files this, its First Amended Original Petition, in lieu of its Original Petition as Amended heretofore filed herein, and complaining of Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, shows to the Court as follows:

I

This is a suit at law of a civil nature. The matter in controversy herein exceeds Three thousand Dollars ($3,000), exclusive of interest and costs. The plaintiff Ford Motor Company is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Delaware, and is a citizen of the State of Delaware. The defendants, and each of them, are citizens of the State of Texas. This court has jurisdiction because there is a diversity of citizenship between the parties hereto, and in that the amount in controversy is in excess of $3,000, exclusive of interest and costs.

[fol. 3] II

Plaintiff, Ford Motor Company, is as aforesaid a corporation duly created, organized and existing under and by virtue of the laws of Delaware, having its principal office

and place of business in the State of Michigan, City of Dearborn, County of Wayne.

The defendant, Edward Clark, is now the duly appointed, qualified and acting Secretary of State of the State of Texas, and has been substituted as defendant herein in lieu of R. B. Stanford, resigned, formerly the duly appointed, qualified and acting Secretary of State of the State of Texas. The defendant Charley Lockhart is now, and at all times material hereto has been, the duly elected, qualified and acting State Treasurer of the State of Texas. The defendant William McCraw is now, and at all times material hereto has been, the duly elected, qualified and acting Attorney General of the State of Texas. Said defendants, and each of them, are resident citizens of Travis County, Texas, and have heretofore entered their appearances and filed their answers herein.

III

This is a suit pursuant to the provisions of the Acts of the 43rd Legislature of the State of Texas, Chapter 214, page 637, known as the Suspension Statutes, for the recovery of taxes illegally assessed and paid the State of Texas under protest and to enforce the rights extended plaintiff as taxpayer under the terms and provisions of said Acts of the 43d Legislature, Chapter 214, known as and hereinafter referred to as the Suspension Statutes.

[fol. 4]

IV

Long prior to the occurrence of the matters hereinafter set out and complained of, plaintiff legally and lawfully obtained from the State of Texas a permit as a foreign corporation to transact business within the State of Texas. At all times material hereto said permit was in full force and effect and so remains in full force and effect; and plaintiff was and is duly authorized to transact its business within the State of Texas having, as aforesaid, duly qualified thereto, pursuant to the statutes of the State of Texas in said cases made and provided.

V

In addition to the requirements of the State of Texas for the obtaining by foreign corporations of a permit to transact business within the State of Texas, the statutes of

the State of Texas, to-wit, Articles 7084 and 7085, Revised Civil Statutes of the State of Texas of 1925, as amended by the Acts of the 42nd Legislature, Chapter 265, page 441, provide that a foreign corporation such as plaintiff, authorized to do business in Texas, shall on or before May 1st of each year pay in advance to the Secretary of State a franchise tax for the year following, based upon that proportion of its outstanding capital stock, surplus and undivided profits plus the amount of outstanding bonds, notes and debentures other than those maturing less than a year from the date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax should be computed at the following rates: for each $1000 or fractional part thereof; One to One Million Dollars, 60¢; in excess of One Million Dollars, 30¢; provided that such tax shall not be less than Ten Dollars. Said statutes as amended provide that foreign corporations such as plaintiff who have done [fol. 5] business in Texas for as much as a year prior to the date upon which such tax becomes payable, shall pay the tax based upon computations from the data contained in the reports required by Articles 7087 and 7089, Revised Civil Statutes of Texas of 1925.

VI

Said statutes as amended provide substantially for the filing of a report to the Secretary of State between January 1st and March 15th of each year by foreign corporations such as plaintiff on blanks furnished by the Secretary of State showing the condition of the corporation on the last day of its preceding fiscal year. Such statutes provide that the Secretary of State may extend the time for filing such report for good cause shown to any date up to May 1st.

VII

The reports required by said Articles require information showing the cash value of all gross assets of the corporation, the amount of its authorized capital stock, the capital stock actually subscribed, and the amount paid in, the surplus and undivided profits or deficits, if any, the amount of mortgage, bonded and current indebtedness, the amount and date of payment of the last annual, semi-annual, quarterly or monthly dividend, the amount of all

taxes paid and duly payable separately to the State of Texas and political subdivisions thereof, the total gross receipts of the corporation from all sources and the gross receipts from business done in Texas for the fiscal year preceding, with detailed balance sheet and income and profit and loss statement in such form as the Secretary of State may prescribe.

VIII

Article 7091, Revised Civil Statutes of the State of Texas of 1925, provides for a penalty of 25% for failure to pay [fol. 6] said franchise tax promptly when due, and that for a failure to pay same on or before the first day of July after same becomes due the corporation shall forfeit its right to do business in the State, forfeiture to be accomplished without judicial ascertainment by the Secretary of State entering upon the margin of the record kept in his office relating to the corporation the words "Right to do business forfeited" and the date of such forfeiture

IX

The principal business of plaintiff Ford Motor Company is that of a manufacturer and vendor of automobiles and self-propelled vehicles and parts therefor.

X

The fiscal year of plaintiff corporation ends with the calendar year on December 31st of each year.

XI

Plaintiff transacted business in the State of Texas during the whole of its fiscal year 1935 which ended December 31, 1935, and ever since said time up to and including the date of filing of this petition has continued so to transact its business and intends and expects in the future so to do.

In brief, plaintiff's Texas business is conducted in the following way: Plaintiff owns and operates within the State of Texas assembly plants. No parts for the self-propelled motor vehicles sold by plaintiff are manufactured at said assembly plant or at any other point within the State of Texas. All of said parts are manufactured at plants outside of the State of Texas, located for the most

part in the State of Michigan. The manufactured parts are shipped from Michigan and other points outside of the State of Texas to plaintiff's assembly plants in Texas, and [fol. 7] are there assembled or put together into finished, self-propelled motor vehicles. The assembled vehicles are then sold in intrastate commerce to various dealers, who in turn sell said vehicles to the public. Some of the vehicles assembled at the Texas plants are sold in interstate commerce, but by far the biggest part thereof is sold, as aforesaid, to Texas dealers in intrastate commerce.

During the year 1935 approximately 60,000 motor vehicles were assembled by plaintiff at its assembly plants in Texas in the manner outlined above. In some few instances completed motor vehicles are shipped into Texas from points outside this State and sold in intrastate commerce. During the year 1935 approximately 700 such units were thus sold in Texas. In addition thereto, Ford Motor Company annually ships into Texas and sells to its various dealers in intrastate commerce many thousands of dollars worth of motor vehicles and tractor parts and accessories, all of which are manufactured without the State of Texas, for the most part, in the State of Michigan.

XII

Prior to March 15, 1936, R. B. Stanford, formerly Secretary of State, and formerly a defendant herein, for good cause shown, granted plaintiff an extension of time for the filing of the reports required by Articles 7087 and 7089, as amended, so as to permit the filing of same within the time same were actually filed as hereinafter alleged. Said report so required by said articles for the purpose of computing the franchise tax of plaintiff for the taxable year May 1, 1936 through April 30, 1937, was actually filed within the extended time granted by the Secretary of State, and prior to May 1, 1936. Said report was in all things in compliance with the terms and provisions of said Articles 7087 and 7089, as amended, and the requirements of the Secretary of State of the State of Texas.

[fol. 8] Said reports showed, among other things, that the gross receipts of plaintiff for the fiscal year ended 1935, from business done in Texas, were $34,272,887.72; that the gross receipts of plaintiff for the fiscal year ended December 31, 1935, from business done outside of Texas were

$854,072,087.75, and that the total gross receipts of plaintiff for the fiscal year ended December 31, 1935, from all business done, both in and out of Texas, and its interstate business, amounted to $888,344,975.47. According to said report the percentage of all of plaintiff's business for the fiscal year ended December 31, 1935, done in Texas was 3.8580606%.

Said report showed total capital at December 31, 1935, of $600,242,151.57. Said report claimed total taxable Texas capital at only $3,079,417.96. Accompanying said report was a certified check in all things in compliance with the requirements of the Secretary of State in favor of the Secretary of State for $1224, which was tendered by plaintiff in payment of its franchise taxes for the taxable year beginning May 1, 1936.

XIII

The facts shown by said report were in all things true and correct, except that as hereinafter alleged the amount of total taxable capital allocated to Texas in said report was in excess of the capital or true value thereof, and the actual and true value of the total of plaintiff's capital devoted to its Texas business.

XIV

When said report and said check in payment of franchise taxes were filed with the Secretary of State, plaintiff filed contemporaneously therewith a letter addressed to the Secretary of State, pointing out that plaintiff had used the value of property in the State of Texas as the total taxable capital instead of allocating capital stock and surplus, and [fol. 9] stating that this was done because of the fact that the allocating method results in a taxable value greatly in excess of the actual taxable value in the State of Texas.

XV

Under date of May 5, 1936, R. B. Stanford, then Secretary of State, and formerly a defendant herein, addressed a letter to plaintiff acknowledging receipt of plaintiff's letter of April 28th and of plaintiff's franchise tax report for the year beginning May 1, 1936, and as well of plaintiff's remittance in the amount of $1224, tendered to cover franchise taxes due by plaintiff as computed by it. In said letter, but

without questioning the correctness of plaintiff's figures and of plaintiff's report in respect to the amount of capital actually devoted to its Texas business, the Secretary of State refused to accept said tender of $1224 as in full of plaintiff's franchise taxes for the taxable year and demanded of plaintiff an additional sum of $6023.40 plus a 25% penalty of $1505.85 for failure to pay the full amount of said franchise tax before May 1, 1936. In said letter the former defendant Secretary of State demanded from plaintiff the payment of said additional amount of taxes and the penalty thereon of 25% under pain of avoiding a forfeiture of plaintiff's right to do business in Texas.

XVI

Under date of May 29, 1936, the former defendant Secretary of State forwarded plaintiff a delinquent franchise tax notice demanding payment from plaintiff of an additional sum of $7,529.25 over and above the $1224 theretofore paid by plaintiff to represent franchise taxes and penalties for the year beginning May 1, 1936, and advised plaintiff was due the State of Texas said sum of $7529.25, and that unless [fol. 10] same was paid on or before July 1st next plaintiff's right to do business would be forfeited without judicial ascertainment, and that the account would be certified to the Attorney General and the State Tax Board for suit for collection.

XVII

Under duress of said demands from the Secretary of State which, as hereinafter alleged, were wholly illegal and without warrant of law, and on June 29, 1936, plaintiff made payment to the Secretary of State of said additional sums so demanded of it by the Secretary of State, but filed with the Secretary of State simultaneously and in connection with said payment its letter of protest dated June 23, 1936. Said letter was addressed to the Secretary of State and signed by plaintiff by its Secretary and Assistant Treasurer, B. J. Craig. Said letter was a letter of protest setting out fully and in detail each and every ground or reason why it was contended as by said letter it was contended that the demand of the Secretary of State was unlawful and unauthorized, all as is provided for in the Acts of the 43rd Legislature, Chapter 214, page 637.

XVIII

In said letter of protest it was recited that plaintiff had theretofore filed on the forms required a franchise tax return as of December 31, 1935, for the purpose of determining and paying franchise taxes due by plaintiff for the year beginning May 1, 1936. Said letter adverted to the fact that in said franchise tax return the total of all of plaintiff's outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures other than those maturing in less than a year from date of issue, amounted to $600,242,151.57, as well as to the fact that said return showed the total gross receipts for the year [fo' 11] ended December 31, 1935, in respect to business done in Texas and in respect to business done outside of Texas, the business done in Texas being $34,272,887.72, or 3.8580606 per cent of the total of all business done by plaintiff, which latter item amounted to $888,344,975.47. Said letter further adverted to the requirement of the Secretary of State that plaintiff's franchise tax for the year beginning May 1, 1936, be computed upon that proportion of plaintiff's outstanding capital stock, surplus and outstanding profits, etc., as the gross receipts of the Texas business bears to the total gross receipts, and that on such basis of ascertainment of the tax the defendant, the former Secretary of State, demanded a total tax without penalties of $7247.40. Said letter further adverted to the fact that plaintiff in its franchise tax report showed its total taxable capital as $3,079,417.96, so that the franchise tax based thereon would be $1224. Said letter recited that the payment of the additional amount for franchise tax and penalties was made only because plaintiff desired to avoid forfeiture of its right to do business in Texas which would follow upon plaintiff's non-payment of said amount, and said letter further stated that the additional amount demanded by the Secretary of State was paid under protest pursuant to the provisions of Chapter 214 of the Acts of the 43rd Legislature of the State of Texas, and in said letter of protest plaintiff claimed such additioinal tax and penalty to be unlawful and illegal and not properly due and owing by plaintiff, and said letter advised as well of the intention of plaintiff to bring this suit against the former defendant Stanford, formerly Secretary of State, defendant Charley Lockhart, State Treasurer, and defendant. William Mc-

Craw, Attorney General of the State of Texas, for the recovery of said additional tax and penalty as provided for in said Chapter 214 of the Acts of the 43rd Legislature. The basis of illegality of said additional tax and penalties therefor were assigned as follows:

[fol. 12] "We are a corporation organized under the laws of the State of Delaware, with our principal office, however, in the State of Michigan. Our principal business is the manufacture and sale of automobiles and parts therefor, our principal manufacturing plant being located in Michigan, in which State we maintain our principal office from which we direct all of our activities and at which we keep our principal corporate records. We are engaged in the sale and distribution of automobiles and parts therefor in interstate commerce and in commerce between the United States and foreign nations, by far the greater part of our sales being in interstate and foreign commerce, and only a small amount of such sales being in intrastate business in the State of Texas. In fact, the gross receipts from our business done in Texas during the year 1935 was only slightly more than 3.85% of the gross receipts from our entire business. In addition we have large investments in stocks or (of) corporations organized and operating in foreign countries, and own large amounts of bonds, mortgages, notes, United States securities, municipal and state securities and miscellaneous investments, none of which are used, held or located in the State of Texas.

Attached hereto as Exhibit A is a detailed analysis of our assets and capital and surplus, which will be self-explanatory and which is referred to here as if copied in full at this point. The first column gives the net book value of our total assets, the second column gives the value of our capital and surplus representing our total assets (being the net book value of our assets less our liabilities); the third column represents the portion of the capital and surplus allocated [fol. 13] to the State of Texas under formula set forth in Article 7084 of the Revised Statutes of Texas, and being the amount allocated by you to Texas for the purpose of computing the franchise tax; the fourth column represents the net book value of our assets allocated to Texas under said formula, being 3.8580606% of the net book value of our total assets; the fifth column sets forth the actual net book value of our actual assets in the State of Texas; the sixth column

shows the amount of 'capital stock, surplus and undivided profits' representing the actual assets in the State of Texas; and the seventh column represents the excess of the portion of our capital and surplus allocated to Texas by you and by said formula over the capital and surplus representing the assets actually situated in the State of Texas.

From this it will be seen that you, by following the said formula, have attributed to Texas $23,157,705.95 of our capital and surplus, when the actual net book value of all of our assets in Texas is only $3,079,417.96, which figure also is more than the actual value of said assets. The sum of $1224 which we have heretofore paid you is the amount of our franchise tax computed on said figure of $3,079,417.96, whereas the lawful amount of said franchise tax was and is an amount not more than $1,113.90 which is computed at the rates prescribed by the statutes of Texas applied to the amount of $2,712,048.50 (as shown by Column 6 of Exhibit A attached hereto) which is the value of the 'capital stock, surplus and undivided profits' of this company which represents the said assets actually situated in the State of Texas of the net book value of $3,079,417.96. On the other hand, you have computed our franchise tax and have demanded [fol. 14] payment of the same on the basis of $23,157,705.95 of our capital and surplus allocated by you and by said formula to the State of Texas, an amount more than seven times the value of all of our assets located in Texas, and more than eight times the value of the 'capital stock, surplus and undivided profits' representing said assets in Texas.

Under the circumstances, the requirement that we pay said additional tax is the creation by the State of Texas of an arbitrary and unreasonable burden upon our interstate and foreign commerce in violation of the provisions of Article I, Section 8 of the Constitution of the United States vesting in the Congress of the United States the power to regulate commerce with foreign nations and among the several states, and likewise deprives us of our property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deprive any person of his property without due process of law, in that said additional franchise tax demanded is a tax upon property of ours neither located nor used within the State of Texas and is a tax upon our business transacted outside of the State of Texas. In view of said Section 8 of Article I

of the United States Constitution and of said Fourteenth Amendment thereto, neither you nor the State of Texas has any lawful right to demand or require that we pay said additional amount of franchise tax and penalty.

We are paying said additional tax and penalty, however, under protest and compulsion and only because of the provisions of Article 7091 of the Revised Statutes of Texas, 1925, as amended, providing for the forfeiture of our right [fol. 15] to do business if said additional tax and penalty are not paid on or before July 1st and of your letter of May 5, and State of Texas Delinquent Franchise Tax Notice dated May 29, 1936, for Account No. 2941, advising that said additional tax and penalty must be paid on or before said date in order for us to avoid the incurring of said forfeiture.'"

XIX

Attached hereto is a true and correct copy of said letter of protest in haec verba and of Exhibit A attached thereto. Said letter and said Exhibit A are denominated Exhibits C and D, respectively, to this petition.

XX

In this connection, plaintiff alleges that the facts, figures and amounts shown by said Exhibit A attached to said letter of protest of June 23, 1936, are true and correct, and the facts, figures and amounts set out in said Exhibit A and said letter of protest are here adopted and alleged as fully as if set out herein in haec verba, although plaintiff here specifically alleges briefly the following in respect to its condition as of the end of its fiscal year 1935: The net book value of its total assets wherever located was $681,549,928.71. The total amount of plaintiff's property represented by its capital stock, surplus and undivided profits was $600,242,151.57. Plaintiff had no outstanding notes, bonds or debentures maturing less than a year from date of issue. The proportion of plaintiff's capital and surplus which would be allocated to Texas under the formula prescribed by statute and insisted upon by the Secretary of State would be $23,157,705.95. The net book value of assets allocated to Texas under the formula insisted upon by the Secretary of [fol. 16] State, being the statutory formula, would be $26,294,609.26. The actual net book value of plaintiff's actual assets in Texas was $3,079,417.96. The actual value of

plaintiff's capital and surplus representing actual assets in Texas was $2,712,048.50. The excess of capital and surplus allocated to Texas by the Secretary of State over the capital and surplus representing actual assets in Texas amounts to $10,445,657.45.

XXI

As is apparent from the statutes governing calculation of franchise taxes for foreign corporations doing business in Texas, said corporations are required to pay franchise taxes based on that proportion of their total net capital actually devoted to Texas business, and the sole and only purpose of the formula set up by said statutes is to ascertain and arrive at the value of capital assets devoted to and used in connection with Texas business and the tax is computed on the value of such assets at the rates provided by statute, but this construction of the statutes is denied by defendants, who claim the sole purpose of the statutory formula is to value the privilege of doing business in Texas.

XXII

In the light of the facts and as applied to plaintiff, the formula provided by statute for ascertaining the amount of taxable capital in Texas upon which franchise taxes for foreign corporations are based is arbitrary, unreasonable, whimsical and capricious and results in the State levying a tax on capital and assets used by plaintiff in its interstate business and in the State of Texas levying a tax upon property outside the confines of the State of Texas, all of which constitutes an unreasonable and arbitrary burden upon interstate and foreign commerce in violation of the provisions of Article I, Section 8 of the provisions of the Constitution of the United States vesting in the Congress of the United [fol. 17] States the power to regulate commerce with foreign nations and among the several states, and likewise operates to deprive plaintiff of its property without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of his property without due process of law, for that the requirement that plaintiff pay a franchise tax to the State of Texas calculated on the formula set up by statute results in plaintiff being required to pay a tax on property neither located nor used within the State of Texas, and a tax upon property

used by plaintiff in its interstate and foreign commerce. Much of plaintiff's property located outside of the State of Texas is used in interstate and foreign commerce.

XXIII

As hereinabove plead, plaintiff's business is largely that of a manufacturer of automobiles, tractors, and parts therefor. Its principal manufacturing plants are located outside of the State of Texas and in the State of Michigan. The assets representing the value of its capital and surplus is represented to a large extent by investments in manufacturing plants. Much of its personal property consisting of investments, evidences of indebtedness, and other securities, has a taxable situs referable alone to the state of Michigan, where plaintiff has a business domicile. Thus the value of plaintiff's capital and surplus represented by its total assets at all times material hereto was $600,242,151.57. Of the total actual value of its capital and surplus represented by its total assets, the actual value of such assets in Michigan amounted to $504,111,209.10.

Were the statutory formula herein complained of to be applied to plaintiff's total gross receipts for Michigan business for the period of time material hereto, the result would [fol. 18] be to allocate to Michigan, to represent the total value of its capital and surplus represented by capital actually located in Michigan, $190,536,153.33, or a sum less than the value of its assets representing capital and surplus actually located in Michigan by $336,305,703.12. The total of the Michigan deficiency allocated to Texas is $18,009,733.12. The remainder of the excess of capital theoretically in Texas under the statutory formula over the actual value of capital and surplus in Texas represents a deficiency in allocations to states other than Michigan. Thus, the effect of applying the statutory formula in arriving at the value of plaintiff's assets actually in Texas is to allocate to Texas capital and surplus of a value largely in excess of the actual value of plaintiff's capital and surplus located in Texas, and results in creating deficiencies in locations in other states, principally Michigan, of capital and surplus assets represented in those states. What is true of plaintiff is necessarily true of any large manufacturing concern which manufactures in one state but distributes in others, including Texas, in that business is done when sales are made, but the

work, labor and processing which necessarily precede the making of sales is done at the place of manufacture. The effect of the statute therefore, in the case of plaintiff, is that Texas taxes plaintiff's property actually located in Michigan and states other than Texas, on the theory that a certain arbitrary percentage of plaintiff's property representing the value of its capital and surplus is actually located in Texas, whereas this theory has no support in fact.

There is attached hereto and marked Exhibit X, a true and correct statement showing how a deficiency in capital and surplus actually allocated to Michigan by the arbitrary formula of the statute is arrived at. There is also attached Exhibit Y, giving certain information in respect to total gross receipts from plaintiff's business, gross receipts from [fol. 19] business done in Michigan, and from business done in other states, etc.

All of the facts shown by and set up in said Exhibits X and Y are adopted as if fully set out herein and plaintiff alleges that said facts and figures shown in said exhibits are true and correct.

XXIV

In this connection, the plaintiff here now alleges that the facts, all and singular, claimed by plaintiff to exist with respect to it and its business in its said letter of protest to the former Secretary of State dated June 23, 1936, do all and singular, in truth and in fact, exist as set out in said letter, and as shown by the accompanying Exhibit A attached thereto.

XXV

Wherefore plaintiff says that there has been unlawfully and illegally collected from it by the Secretary of State of the State of Texas as franchise taxes for the year beginning May 1, 1936, and as penalties accruing because of the nonpayment of that part of the demands of the Secretary of State for franchise taxes which are illegal, unconstitutional and unenforceable, the sum of $7529.25, being the additional franchise tax of $6023.40, and the penalty of $1505.85. Said excessive payment having been made pursuant to the illegal demands of the Secretary of State in all things pursuant to the provisions of Chapter 214 of the Acts of the 43rd Legislature of the State of Texas, and said amounts so paid under protest having been dealt with and handled as is provided

by said Chapter 214 of the Acts of the 43rd Legislature of the State of Texas, this suit being filed within ninety (90) days from the date of such payment under protest and the issues herein being those arising out of the grounds and reasons set forth in the written protest as originally filed, [fol. 20] plaintiff is entitled to a final determination herein that such money so paid by it was unlawfully demanded by the Secretary of State, and that same belongs to plaintiff, and for judgment of the court in such cases made and provided, as is contemplated by said Chapter 214 of the Acts of the 43rd Legislature of the State of Texas.

Wherefore, plaintiff prays that citation issue in terms of law to the defendants, and each of them, requiring them to appear and answer herein, and that on final trial hereof plaintiff have judgment finally determining that said sum of $7529.25 so paid to the Secretary of State by plaintiff under protest was unlawfully demanded of and collected from plaintiff by the Secretary of State, and that same belongs to plaintiff, and directing said State Treasurer to refund such amount, together with the pro rata interest earned thereon, to plaintiff by the issuance of a refund warrant, and plaintiff prays for such other and further relief in the premises, general and special, legal and equitable, to which it may show itself entitled.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Ford Motor Company.

EXHIBIT "C" TO PETITION

(True Copy)

June 23, 1936

Secretary of State, State of Texas, Austin, Texas.

DEAR SIR:

We, the undersigned, Ford Motor Company, a corporation organized under the laws of the State of Delaware, have heretofore, within the time required by the statutes of the State of Texas, filed on the forms submitted by you our franchise tax return as of December 31, 1935, for the [fol. 21] purpose of determining and paying the franchise tax due by us to the State of Texas for the year beginning

May 1, 1936. In that franchise tax return we showed the following items which correctly reflected said items as of December 31, 1935:

Capital Stock—Subscribed, issued and outstanding (including reacquired or treasury stock):	
(a) Preferred	None
(b) Common (Par Value)	$17,264,500.00
Net surplus and undivided profits	582,977,651.57
Bonds, notes and debentures maturing one year or more from date of issue (subscribed, issued and outstanding)	None
Total	$600,242,151.57

In said return we also showed the following items as of December 31, 1935, which correctly represented said items:

Gross Receipts for the year ended December 31st, 1935:

(a) Business done in Texas	$34,272,887.72	3.8580606%
(b) Business done outside of Texas	854,072,087.75	96,1419394%
Total Gross Receipts	$888,344,975.47	100%

You have advised us by your letter dated May 5, 1936, and by the State of Texas Delinquent Franchise Tax Notice dated May 29, 1936, for Account No. 2941, that under Article 7084 of the Revised Statutes of Texas 1925, as amended, the franchise tax to be paid by us for the year beginning May 1, 1936, is to be computed upon that proportion of our outstanding capital stock, surplus and undivided profits, plus the amount of our outstanding bonds, notes and de- [fol. 22] bentures other than those maturing in less than a year from date of issue, as the gross receipts from our business done in Texas bears to our total gross receipts, and that on this basis our franchise tax for the year beginning May 1, 1936, will be $7,247.40.

It seems apparent that you have arrived at this figure by multiplying the above figure of $600,242,151.57 by the above percentage figure of 3,8580606%, and arrived at the figure of $23,157,705.95, as being that portion of our capital and surplus upon which said franchise tax is to be computed

at the rate of 60 cents per thousand for the first $1,000,000 and 30 cents per thousand or fractional part thereof for all in excess of $1,000,000. In our franchise tax report we show that our total taxable capital, as shown in item No. 10 on our franchise tax return, was $3,079,417.96, and our franchise tax based thereon, at the rates prescribed by the statutes of Texas, was $1,224. We *here* heretofore paid to you before May 1, 1936, such sum of $1,224, but you, by your letter to us of May 5th, and by State of Texas Delinquent Franchise Tax Notice dated May 29, 1936, for account No. 2941, have advised that our total franchise tax would be $7,247.40 and that we are liable, after the above $1,224 has been credited to our account, for an additional tax of $6,023.40 plus a 25% penalty of $1,505.85 for failure to pay the full amount of said alleged franchise tax on or before May 1, 1936, and have advised us that unless said additional amount and penalty are paid on or before July 1, 1936, our right to do business in Texas will be forfeited.

Because of your demands set forth in your letter of May 5, 1936, and in State of Texas Delinquent Franchise Tax Notice dated May 29, 1936, for Account No. 2941, for the payment of said additional amount and penalties, and advice therein contained that the said amount should be paid on or before July 1, 1936, in order to avoid the forfeiture [fol. 23] of our right to do business in Texas and in view of the provisions of Article 7091 of the Revised Statutes of Texas, 1925, as amended, providing for the forfeiture of our right to do business in Texas if said amount is not paid to you on or before July 1, we enclose certified check in your favor for the sum of $7,529.25, being the above alleged additional franchise tax of $6,023.40 and said penalty of $1,505.85.

This additional amount is being paid to you under protest under the provisions of Chapter 214 of the Acts of the Forty-Third Legislature of the State of Texas, and we claim said additional tax and penalty are unlawful and illegal, and are not lawfully and legally owing by us for the reasons hereinafter set forth in this protest, and we advise you that said sums are so being paid under protest and that we will within the time prescribed by said Chapter 214 bring suit against you, the State Treasurer and the Attorney General of the State of Texas for the recovery of said additional tax and penalty as provided for in said Chapter 214.

We claim said additional tax and penalty are unlawful, and you are not lawfully entitled to demand or collect the same on the following grounds and reasons:

We are a corporation organized under the laws of the State of Delaware, with our principal office, however, in the State of Michigan. Our principal business if the manufacture and sale of automobiles and parts therefor, our principal manufacturing plant being located in Michigan, in which State we maintain our principal office from which we direct all of our activities and at which we keep our principal corporate records. We are engaged in the sale and distribusion of automobiles and parts therefor in interstate commerce and in commerce between the United States and foreign nations, by far the greater part of our sales being in interstate and foreign commerce, and only a small amount [fol. 24] of such sales being in intrastate business in the State of Texas. In fact, the gross receipts from our business done in Texas during the year 1935 was only slightly more than 3.85% of the gross receipts from our entire business. In addition we have large investments in stocks or corporations organized and operating in foreign countries, and own large amounts of bonds, mortgages, notes, United States securities, municipal and state securities and miscellaneous investments, none of which are used, held or located in the State of Texas.

Attached hereto as Exhibit A is a detailed analysis of our assets and capital and surplus, which will be self explanatory and which is referred to here as if copied in full at this point. The first column gives the net book value of our total assets, the second column gives the value of our capital and surplus representing our total assets (being the net book value of our assets less our liabilities); the third column represents the portion of the capital and surplus allocated to the State of Texas under formula set forth in Article 7084 of the Revised Statutes of Texas and being the amount allocated by you to Texas for the purpose of computing the franchise tax; the fourth column represents the net book value of our assets allocated to Texas under said formula, being 3.8580606% of the net book value of our total assets; the fifth column sets forth the actual net book value of our actual assets in the State of Texas; the sixth column shows the amount of 'capital stock, surplus and undivided profits' representing the actual assets in the State of Texas; and the seventh column represents the excess of the portion

of our capital and surplus allocated to Texas by you and by said formula over the capital and surplus representing the assets actually situated in the State of Texas.

[fol. 25] From this it will be seen that you, by following the said formula, have attributed to Texas $23,157,705.95 of our capital and surplus, when the actual net book value of all of our assets in Texas is only $3,079,417.96, which figure also is more than the actual value of said assets. The sum of $1,224 which we have heretofore paid you is the amount of our franchise tax computed on said figure of $3,079,417.96 whereas the lawful amount of said franchise tax was and is an amount not more than $1,113.90 which is computed at the rates prescribed by the statutes of Texas applied to the amount of $2,712,048.50 (as shown by Column 6 of Exhibit A attached hereto) which is the value of the 'capital stock, surplus and undivided profits' of this company which represents the said assets actually situated in the State of Texas of the net book value of $3,079,417.96. On the other hand, you have computed our franchise tax and have demanded payment of the same on the basis of $23,157,705.95 of our capital and surplus allocated by you and by said formula to the State of Texas, an amount more than seven times the value of all of our assets located in Texas, and more than eight times the value of the 'capital stock, surplus and undivided profits' representing said assets in Texas.

Under the circumstances, the requirement that we pay said additional tax is the creation by the State of Texas of an arbitrary and unreasonable burden upon our interstate and foreign commerce in violation of the provisions of Article I, Section 8 of the Constitution of the United States vesting in the Congress of the United States the power to regulate commerce with foreign nations and among the several states, and likewise deprives us of our property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deprive any person [fol. 26] of his property without due process of law, in that said additional franchise tax demanded is a tax upon property of ours neither located nor used within the State of Texas and is a tax upon our business transacted outside of the State of Texas. In view of said Section 8 of Article I of the United States Constitution and of said Fourteenth Amendment thereto, neither you nor the State of Texas has

any lawful right to demand or require that we pay said additional amount of franchise tax and penalty.

We are paying said additional tax and penalty, however, under protest and compulsion and only because of the provisions of Article 7091 of the Revised Statutes of Texas, 1925, as amended, providing for the forfeiture of our right to do business if said additional tax and penalty are not paid on or before July 1st and of your letter of May 5, and State of Texas Delinquent Franchise Tax Notice dated May 29, 1936 for Account No. 2941, advising that said additional tax and penalty must be paid on or before said date in order for us to avoid the incurring of said forfeiture.

Ford Motor Company, (Signed) B. J. Craig, Secretary and Assistant Treasurer.

BJC:MK.

(Here follow two pasters, side folios 27 and 28)

EXHIBIT "A" TO LETTER OF PROTEST

Item	Net Book Value Total Assets (Col. 1)	Value of Capital & Surplus representing Total Assets (88.070165666% (Col. 2)	Portion of Capital and Surplus Allocated to Texas by Secretary of State (3.8580606% of Col. 2) (Col. 3)	Net Book Value of Assets Allocated to Texas Under Formula Of Secretary of State (113.545829277% of Col. 3) (Col. 4)	Actual Net Book Value of Actual Assets in Texas (Col. 5)	Value of Capital and Surplus representing actual assets in Texas (88.070165666% of Col. 5) (Col. 6)	Excess of Capital & Surplus allocated to Texas by Secretary of State over Capital & Surplus representing actual Assets in Texas (Col. 3 minus Col. 6) (Col. 7)
d and Land Improvements	$53,068,058.21	$46,737,126.78	$1,803,146.67	$2,047,397.84	$212,044.49	$186,747.94	$1,616,398.73
ldings	87,936,457.03	77,445,783.39	2,987,905.24	3,392,641.79	1,115,100.57	982,070.92	2,005,834.32
chinery and Equipment:							
Blast Furnaces & Coke Ovens	1,616,699.42	1,423,829.86	54,982.22	62,393.24			54,932.22
Open Hearth Furnaces & Steel Mills	13,835,959.33	12,185,352.30	470,118.28	533,799.70			470,118.28
Patterns and Pattern Equipment	157,903.62	139,065.98	5,365.25	6,091.98			5,365.25
Freight Car Equipment	549,843.20	484,247.82	18,682.57	21,213.28			18,682.57
Steam Locomotive Equipment	287,512.33	253,212.59	9,769.10	11,092.40			9,769.10
Power Plant Equipment	19,379,520.99	17,067,576.24	658,477.43	747,673.76	52,496.00	46,234.11	612,243.32
Lake and Ocean Ships, Barges, Tugs, etc.	7,871,894.91	6,932,790.89	267,471.27	303,702.47			267,471.27
Other Machinery, Tools & Equipment	42,450,378.75	37,386,118.87	1,442,379.12	1,637,761.26	89,475.56	78,801.27	1,363,577.85
entories	68,568,702.40	60,388,569.80	2,329,827.62	2,645,422.10	1,149,180.73	1,012,085.37	1,317,742.25
struction in Process	5,387,095.47	4,744,423.91	183,042.75	207,837.40	16,811.16	14,805.62	168,237.13
ferred Charges:							
Unamortized Dies	1,124,627.21	990,461.05	38,212.59	43,388.80			38,212.59
Prepaid Insurance	749,036.26	659,677.48	25,450.76	28,898.27			25,450.76
Other prepaid expenses	1,255,923.29	1,106,093.72	42,673.77	48,454.28			42,673.77
ents	137,502.90	121,099.03	4,672.07	5,304.94			4,672.07
cks of Foreign Corporations	66,413,152.05	58,490,173.03	2,256,586.32	2,562,259.65			2,256,586.32
nds, Mortgages and Notes	61,475.00	54,141.13	2,088.80	2,371.74			2,088.80
ited States Securities	82,026,813.46	72,241,150.53	2,787,107.37	3,164,644.18			2,787,107.37
nicipal and State Securities	7,906,647.23	6,963,397.31	268,652.09	305,043.24			268,652.09
scellaneous Investments	1,019,901.00	898,228.50	34,654.20	39,348.39			34,654.20
sh	137,022,959.86	120,676,348.00	4,655,766.64	5,286,428.87	1,929.63	1,699.43	4,654,067.21
tes Receivable	2,961,303.59	2,608,024.98	100,619.18	114,248.87			100,619.18
counts Receivable	79,760,561.20	70,245,258.38	2,710,104.64	3,077,210.81	442,378.92	389,603.84	2,320,500.80
Total	$681,549,928.71	$600,242,151.57	$23,157,705.95	$26,294,609.26	$3,079,417.96	$2,712,048.50	$20,445,657.45

[fol. 28]

EXHIBIT "X" TO PETITION

Item	Net Book Value Total Assets	Value of Capital & Surplus Representing Total Assets (88.070165666%)	Portion of Capital & Surplus Allocated to Michigan by Secretary of State (27.[illegible]3015591% of Col. 2)	Value of Assets Allocated to Michigan under Formula of Secretary of State (113.5[illegible]5829277% of Col. 3)	Value of Actual Assets in Michigan	Value of Capital and Surplus Representing Actual Assets in Michigan (88.070165666% of Col. 5)	Excess of Capital & Surplus Allocated to Michigan by Secretary of State over Capital & Surplus Representing Actual Assets in Michigan (Red indicates Deficiency) (Col. 3 minus Col. 6)
	(Col. 1)	(Col. 2)	(Col. 3)	(Col. 4)	(Col. 5)	(Col. 6)	(Col. 7)
1. Land and Land Improvements	$53,068,058.21	$46,737,126.78	$13,065,972.10	$14,835,866.37	$36,703,831.20	$32,325,124.95	$19,259,152.85
2. Buildings	87,936,457.03	77,445,783.39	21,650,976.75	24,583,781.10	47,190,955.65	41,561,152.82	19,916,176.07
3. Machinery and Equipment:							
(a) Blast Furnaces and Coke Ovens	1,616,699.42	1,423,829.86	398,050.17	451,969.37	1,616,699.42	1,423,829.86	1,025,779.69
(b) Open Hearth Furnaces & Steel Mills	13,835,959.33	12,185,352.30	3,406,573.84	3,868,022.52	13,835,959.33	12,185,352.30	8,778,778.46
(c) Patterns and Pattern Equipment	157,903.62	139,065.98	38,877.70	44,144.01	157,903.62	139,065.98	100,188.28
(d) Freight Car Equipment	549,843.20	484,247.82	135,377.78	153,715.82	549,843.20	484,247.82	348,870.04
(e) Steam Locomotive Equipment	287,512.33	253,212.59	70,788.88	80,377.82	287,512.33	253,212.59	182,423.71
(f) Power Plant Equipment	19,379,520.99	17,067,576.24	4,771,463.08	5,417,797.32	17,879,635.51	15,746,624.60	10,975,161.52
(g) Lake & Ocean Ships, Barges, Tugs, etc.	7,871,894.91	6,932,7[illegible] 89	1,938,151.93	2,200,690.68	7,871,894.91	6,932,790.89	4,994,638.96
(h) Other Machinery, Tools & Equipment	42,450,378.75	37,386,118.[illegible]	10,451,776.13	11,867,555.88	37,476,393.04	33,005,521.44	22,553,745.31
4. Inventories	68,568,702.40	60,388,509.80	16,882,410.68	19,169,273.21	28,835,088.02	25,395,109.78	8,512,699.10
5. Construction in Process	5,387,095.47	4,744,423.91	1,326,365.46	1,506,032.66	5,183,063.01	4,564,732.18	3,238,366.72
6. Deferred Charges:							
(a) Unamortized Dies	1,124,627.21	990,461.05	276,896.28	314,404.18	1,124,627.21	990,461.05	713,564.77
(b) Prepaid Insurance	749,036.26	659,677.48	184,421.43	209,402.84	704,627.63	620,566.72	436,145.29
(c) Other prepaid expenses	1,255,923.29	1,106,093.72	309,222.89	351,109.69	1,247,808.49	1,098,947.00	789,724.11
7. Patents	137,502.90	121,099.03	33,854.81	38,440.72	137,502.90	121,099.03	87,244.22
8. Stocks of Foreign Corporations	66,413,152.05	58,490,173.03	16,351,689.15	18,566,661.04	66,413,152.05	58,490,173.03	42,138,483.88
9. Bonds, Mortgages and Notes	61,475.00	54,141.13	15,135.86	17,186.14	61,475.00	54,141.13	39,005.27
10. United States Securities	82,026,813.46	72,241,150.53	20,195,953.89	22,931,663.32	82,026,813.46	72,241,150.53	52,045,196.64
11. Municipal and State Securities	7,906,647.23	6,963,397.31	1,946,708.35	2,210,406.14	7,906,647.23	6,963,397.31	5,016,688.96
12. Miscellaneous Investments	1,019,901.00	898,228.50	251,111.47	285,126.60	1,019,901.00	898,228.50	647,117.03
13. Cash	137,022,959.86	120,676,348.00	33,736,643.76	38,306,551.92	137,824,109.52	121,381,921.58	87,645,277.82
14. Notes Receivable	2,961,303.59	2,608,024.98	729,107.33	827,870.96	2,96[illegible],303.59	2,608,024.98	1,878,917.65
15. Accounts Receivable	79,760,561.20	70,245,258.38	19,637,976.26	22,298,103.02	73,380,505.81	64,626,333.03	44,988,356.77
Total	$681,549,928.71	$600,242,151.57	$167,805,505.98	$190,536,153.33	$572,397,253.13	$504,111,209.10	$336,305,703.12

8/19/36

[fol. 29] EXHIBIT "Y" TO PETITION

9-24-36.

Ford Motor Company

3674 Schaefer Road—Dearborn Michigan

1936 Texas Franchise Tax

Amount of Michigan Capital and Surplus Allocated to Texas

Item No.	Particulars	Amount or Percentage
Col. 1	Col. 2	Col. 3
1.	Total gross receipts (everywhere)	$888,344,975.47
2.	Gross receipts from business done in Michigan	248,348,400.23
3.	Total gross receipts excluding gross receipts from business done in Michigan (item 1 minus item 2)	639,996,575.24
4.	Gross receipts from business done in Texas	34,272,887.72
5.	Ratio of Texas gross receipts to total gross receipts excluding gross receipts from business done in Michigan (item 4 divided by item 3)	5.3551673269%
6.	Deficiency of capital and surplus allocated to Michigan by Texas method (Exhibit —, Col. 7)	$336,305,703.12
7.	Amount of Michigan deficiency allocated to Texas (item 6 multiplied by item 5)	18,009,733.13

[fol. 30] IN UNITED STATES DISTRICT COURT

DEFENDANTS' ORIGINAL ANSWER—Filed January 23, 1937

To the Honorable R. J. McMillan, Judge:

Now come R. B. Stanford, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the

State of Texas, and William McCraw, Attorney General of the State of Texas, defendants herein, and demur generally to plaintiff's original petition filed herein, and say that the allegations of fact contained in such petition, if taken as true, constitute no cause of action against these defendants.

Defendants demur generally to plaintiffs' original petition filed herein, and especially to that portion of such petition which attempts to set forth that the statute of the State of Texas complained of therein, the allegations of fact contained in such petition being taken as true, constitutes a burden upon interstate commerce.

Defendants further demur generally to plaintiff's original petition filed herein, and especially to that portion of said petition, the allegations of fact being taken as true, which says that the statute complained of deprives the plaintiff of property without due process of law.

Wherefore, defendants pray that plaintiff recover nothing by its suit, and that defendants go hence and recover their costs about this cause expended.

Wm. McCraw, Attorney General of Texas; Llewellyn B. Duke, Assistant Attorney General; Earl Street, Assistant Attorney General.

[fol. 31] IN UNITED STATES DISTRICT COURT

DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER—Filed January 26, 1937

To the Honorable R. J. McMillan, Judge:

Now come Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, defendants herein, and demur generally to plaintiff's original petition filed herein, and say that the allegations of fact contained in such petition, if taken as true, constitute no cause of action against these defendants.

Defendants demur generally to plaintiff's original petition filed herein, and especially to that portion of such petition which attempts to set forth that the statute of the State of Texas complained of therein, the allegations of fact contained in such petition being taken as true, constitutes a burden upon interstate commerce.

Defendants further demur generally to plaintiff's original petition filed herein, and especially to that portion of said petition, the allegations of fact being taken as true, which says that the statute complained of deprives the plaintiff of property without due proess of law.

Defendants deny all and singular the allegations in plaintiffs' petition contained and demand strict proof thereof, and of this it puts itself upon the country.

[fol. 32] Wherefore, defendants pray that plaintiff recover nothing by its suit, and that defendants go hence and recover their costs about this cause expended.

Wm. McCraw, Attorney General of Texas; Llewellyn B. Duke, Assistant Attorney General; Earl Street, Assistant Attorney General, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

DEFENDANTS' AMENDED ANSWER—Filed October 15, 1937

To the Honorable R. J. McMillan, Judge:

Now come Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, defendants herein, and in response to plaintiff's first amended original petition, and in lieu of all other answers heretofore filed in this cause, and demur generally to plaintiff's said first amended original petition, and say that the allegations thereof are insufficient in law to require these defendants to answer, and that the allegations of fact contained in said petition, if taken as true, constitute no cause of action against these defendants.

[fol. 33] Defendants demur generally to plaintiff's first amended original petition filed herein, and especially to that portion thereof which attempts to set forth that the statute of the State of Texas complained of herein, the allegations of fact contained in said petition being taken as true, constitutes a burden on interstate commerce.

Defendants demur generally to plaintiff's first amended original petition filed herein, and especially to that portion of said petition, the allegations of fact being taken as true, which says that the statute complained of herein deprives the plaintiff of property without due process of law.

Wherefore, defendants pray that plaintiff recover nothing by its suit, and that defendants go hence and recover their costs about this cause expended.

William McCraw, Attorney General of Texas; Earl Street, Assistant Attorney General; L. B. Duke, Assistant Attorney General; C. M. Kennedy, Assistant Attorney General.

[fol. 34] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed October 15, 1937

On the 15th day of October, 1937, the above styled and numbered cause coming regularly on to be heard, came the plaintiff, Ford Motor Company, and announced ready for trial, and came the defendants, Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McGraw, Attorney General of the State of Texas, and announced ready for trial, whereupon the defendants presented their general demurrer to plaintiff's First Amended Original Petition, and the Court heard argument on said demurrer by both defendants and the plaintiff. And the Court being of the opinion that said demurrer is well taken and should be sustained;

It is, Therefore, Ordered, Adjudged and Decreed by the Court that the general demurrer of the defendants to the First Amended Original Petition of plaintiff be in all things sustained, to which action of the Court in so sustaining said demurrer plaintiff then and there in open court excepted; and the plaintiff refusing to amend, the Court is of the opinion that defendants are entitled to a judgment in their favor on the merits of this controversy.

It is, Therefore, Ordered, Adjudged and Decreed by the Court on this, the 15th day of October, 1937, that plaintiff take nothing by its suit herein against the defendants, Edward Clark, Secretary of State, Charley Lockhart, State Treasurer, and William McCraw, Attorney General, of the State of Texas, or any of them, and that said defendants go hence without day and recover of and from plaintiff all their costs in this behalf expended, for which execution may issue, as by law provided.

[fol. 35] To the action of the Court in so rendering judgment against it and in favor of the defendants, plaintiff then and there in open court excepted.

Robert J. McMillan, Judge.

O. K. Earl Street, Ass't Atty. Gen. of Texas.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL AND WAIVER OF ISSUANCE AND SERVICE OF CITATION—Filed November 19, 1937

To Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, William McCraw, Attorney General of the State of Texas, or their attorneys of record, William McCraw, Earl Street, L. B. Duke, and C. M. Kennedy:

You will take notice that plaintiff, Ford Motor Company, appeals from the final judgment entered in the above entitled and numbered cause, as of October 15, 1937, and has deposited with the Clerk of the United States District Court at Austin, Texas, an appropriate petition for such appeal, together with Assignments of Error, and a bond in the form and amount required by law.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Plaintiff.

[fol. 36] We acknowledge service of the above notice, together with copy of the Assignments of Error, on this the 18th day of November, 1937, and hereby waive further service thereof, and also hereby accept service of citation on appeal and waive any further action towards obtaining the issuance and service of citation on appeal.

Dated this 18th day of November, 1937.

Edward Clark, Secretary of State of the State of Texas; Charley Lockhart, State Treasurer of the State of Texas; William McCraw, Attorney General of the State of Texas, by William McCraw, Atty. Gen. of Texas; Earl Street, Asst. Atty. Gen. of Texas; L. B. Duke, Asst. Atty. Gen. of Texas; C. M. Kennedy, Asst. Atty. Gen. of Texas, their attorneys of Record, by Earl Street.

[fol. 37] IN UNITED STATES DISTRICT COURT

APPLICATION FOR APPEAL—Filed November 19, 1937

To the Honorable R. J. McMillan, Judge of said Court:

Comes now Ford Motor Company and shows to the Court that on October 15, 1937, a final judgment was entered by Your Honor in the above entitled and numbered cause, against this plaintiff and in favor of all of the defendants in this cause, to-wit, Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, and the costs of such named defendants were adjudged against plaintiff, and plaintiff's right to recover against said named defendants was by the Court denied, the Court refusing to grant to plaintiff any of the relief prayed for by it, and refusing to determine that the sum of Seventy five hundred twenty-nine and 29/100 Dollars ($7529.29) heretofore paid by plaintiff to the Secretary of State of Texas under protest was unlawfully demanded of and collected from plaintiff by the Secretary of State, and refusing to determine that said sum belongs to plaintiff, and refusing to direct the State Treasurer to refund such amount, together with pro rata interest earned thereon, to plaintiff by the issuance of a refund warrant, and the Court denied to plaintiff all the relief prayed for by the plaintiff.

Petitioner, feeling aggrieved by said judgment and other rulings of the Court in said cause, herewith petitions the Court for an order allowing it to prosecute an appeal to the United States Circuit Court of Appeals for the Fifth Circuit under the laws of the United States in such cases made and provided.

[fol. 38] Wherefore, premises considered, petitioner prays for the allowance of an appeal in this behalf to said United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana; for the correction of the errors complained of and herewith assigned; and that an order be made fixing the amount of security to be given by appellant, conditioned as the law directs, and that upon giving such bond as may be required, all further proceedings as against this plaintiff or in favor of said defendants, or

seded until the determination of said appeal by the Circuit Court of Appeals.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Appellant.

Service accepted this 18th day of November, 1937.

William McCraw, Attorney General of Texas; Earl Street, Assistant Attorney General of Texas; L. B. Duke, Asst. Attorney General of Texas; C. M. Kennedy, Asst. Atty. General of Texas, Attorneys for All Defendants, by Earl Street.

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BOND—Filed November 19, 1937

Be it Remembered that the petition of Ford Motor Company, plaintiff herein, for allowance of an appeal from the judgment heretofore entered in this cause, is granted, and the amount of bond to be filed by it is fixed at Five hundred Dollars ($500). All further proceedings herein as between plaintiff and defendants, Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, are suspended, pending the judgment of the Circuit Court of Appeals.

Dated November 19th, 1937.

Robert J. McMillan, Judge.

[fol. 40] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed November 19, 1937

To the Said Honorable Court:

Comes now plaintiff in the above entitled and numbered cause; and in connection with its appeal herein, presents the following assignments of error upon which it will rely for a reversal:

I

The Court erred in sustaining the general demurrer in-

Original Petition, and by deciding that the facts stated in such petition were not sufficient to constitute a cause of action, and by deciding that the facts stated in said petition did not entitle the plaintiff to any of the relief prayed for by it.

II

It was error for the Court to fail and refuse to render judgment granting the plaintiff the relief prayed for by it, it appearing that the defendants relied solely upon a general demurrer to plaintiff's petition in defense of plaintiff's claims and demands and causes of action.

III

The Court erred in sustaining the general demurrer of the defendants to plaintiff's pleading and, upon plaintiff's refusal to amend, in rendering judgment based on said ruling against plaintiff and in favor of defendants.

IV

The Court erred in sustaining the general demurrer of the defendants to plaintiff's First Amended Original Peti- [fol. 41] tion, in so far as said ruling is based upon the holding that the facts alleged in plaintiff's First Amended Original Petition failed to allege sufficient facts to show that, as applied to plaintiff, the Texas Franchise Tax Act applicable to foreign corporations does not act as an unreasonable and arbitrary burden upon interstate and foreign commerce in violation of the provisions of Article I, Section 8, of the Constitution of the United States.

V

The Court erred in sustaining the general demurrer of the defendants to plaintiff's First Amended Original Petition, in so far as that ruling is based upon the Court's holding that the facts alleged in plaintiff's First Amended Original Petition are insufficient to show that the Texas Franchise Tax Act governing the payment of franchise taxes by foreign corporations, does not, as applied to plaintiff, operate to deprive plaintiff of its property without due process of law, in violation of the provisions of the 14th Amendment to the Constitution of the United States.

VI

The Court erred in sustaining the general demurrer of the defendants to the First Amended Original Petition of plaintiff, in so far as the court's ruling constituted a holding that the Texas Franchise Tax Act applicable to foreign corporations, when applied to plaintiff under the facts alleged in its petition, does not deny plaintiff due process of law, contrary to the provisions of the 14th Amendment to the Constitution of the United States, because the operation of said Act, as applied to plaintiff, under the facts alleged in its petition, either operates to permit the State of Texas to levy a tax on capital and assets beyond the confines of the State of Texas or, if viewed [fol. 42] as based in part on the amount of business done in Texas, said tax act is purely whimsical, arbitrary and capricious, for that the formula therein provided for ascertaining the amount of the tax, does not establish any rational relation between the amount of business done in Texas and the amount of the franchise taxes payable by corporations doing such business.

VII

The Court erred in sustaining the demurrer interposed by defendants to plaintiff's First Amended Original Petition filed in this action, and in holding that the formula provided by statute for ascertaining the amount of plaintiff's taxable capital in Texas, upon which franchise taxes are based, does not result in the State of Texas levying a tax on capital and assets beyond the confines of the State of Texas used in its interstate business which constitutes an unreasonable burden on interstate commerce in violation of the provisions of Article I, Section 8 of the Constitution of the United States.

VIII

The Court erred in sustaining the demurrer interposed by defendants to plaintiff's First Amended Original Petition filed in this action, and in holding that the formula provided by statute for ascertaining the amount of plaintiff's taxable capital in Texas, upon which franchise taxes are based, does not result in the State of Texas levying a tax on capital and assets beyond the confines of the State

of Texas which constitutes a deprivation of property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

[fol. 43] IX

The Court erred in sustaining and refusing to overrule the general demurrer of the defendants to plaintiff's First Amended Original Petition, in that the facts alleged in plaintiff's petition show that the Franchise Tax Act of the State of Texas applicable to foreign corporations, when and as applied to plaintiff, operates illegally to deprive plaintiff of its property without due process of law, because said Franchise Tax Act so applicable to foreign corporations, when applied to plaintiff, either enables the State of Texas to tax property beyond its jurisdiction, or enables the State of Texas to condition the privilege extended foreign corporations transacting business within the State of Texas, upon payment of taxes which have no reasonable or rational relation to the value of the privilege granted.

Wherefore, by reason of the errors committed against it, as hereinabove shown and assigned, and other errors apparent on the face of the record herein, appellant prays that final judgment heretofore rendered against it be reversed and judgment rendered in its favor against Defendants Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, as prayed for in its First Amended Original Petition herein.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Appellant.

[fols. 44-50] Bond on appeal for $500.00 approved and filed November 19, 1937, omitted in printing.

[fol. 51] In United States District Court

Appellant's Election to Have Record Printed under Clerk's Supervision—Filed November 19, 1937

Comes now the Appellant and elects to take and file in the United States Circuit Court of Appeals a transcript of

that part of the record in this cause which is requisite for a rehearing thereof in said Appellate Court, same to be printed under the supervision of its Clerk, the portions requisite therefor being stated in the Præcipe for Transcript of record filed herein.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Appellant.

[fol. 52] In United States District Court

Præcipe for Record on Appeal—Filed November 19, 1937

To the Honorable Maxey Hart, Clerk of Said Court:

Please prepare and certify forthwith, or as soon as may be, a transcript of the record in the above entitled and numbered cause, for appeal on same, incorporating in the transcript the following pleadings, and other portions of the record, which includes all deemed material for the review, to-wit:

(1) The usual caption.
(2) Plaintiff's First Amended Original Petition.
(3) Defendants' answers, both the original answer on the merits, and demurrer in lieu of answer.
(4) Judgment of the Court.
(5) Notice of Appeal and Waiver of Citation.
(6) Application for Appeal.
(7) Order allowing Appeal and fixing Bond.
(8) Assignments of Error.
(9) Appellant's Bond, showing approval thereof by the Court.
(10) Notice of Appellant's election to have record printed under the supervision of the Clerk of the Circuit Court of Appeals.
(11) Præcipe for Transcript.
(12) Certificate and authentication by the Clerk of this Court.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Plaintiff.

[fol. 53] We acknowledge service of the foregoing præcipe for transcript of the record, waive further service of

notice of its filing, and agree that the matters called for therein constitute all matters deemed material for the review of this case, and a right to request insertion of any additional part of the record is hereby waived on behalf of defendants.

Wm. McCraw, Atty. Gen. of Texas; L. B. Duke, Ass't Atty. Gen.; C. M. Kennedy, Ass't Atty. Gen.; Earl Street, Ass't Atty. Gen.

Dated: This the 18th day of Nov., A. D. 1937.

[fol. 54] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 55] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 10, 1938

No. 8664

FORD MOTOR COMPANY, a Corporation,

versus

EDWARD CLARK, Secretary of State of the State of Texas, et al.

On this day this cause was called, and, after argument by Gaius G. Gannon, Esq., for appellant, and Earl Street, Esq., for appellees, was submitted to the Court.

[fol. 56] OPINION OF THE COURT—Filed December 15, 1938

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8664

FORD MOTOR COMPANY, a Corporation, Appellant,

versus

EDWARD CLARK, Secretary of State of the State of Texas, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

(December 15, 1938)

Before Sibley, Hutcheson and Holmes, Circuit Judges

SIBLEY, Circuit Judge:

This appeal is from the dismissal on demurrer of an action by Ford Motor Company against officers of the State of Texas to recover certain State franchise taxes for the

year 1936 paid under protest. The contention is that in the amount sued for the exaction violated the interstate commerce clause of the federal Constitution in that it burdened the interstate business of the taxpayer, and the due process clause of the Fourteenth Amendment by taxing property outside the State of Texas.

[fol. 57] The franchise tax law, Revised Statutes of 1925, Arts. 7084, 7085, as amended, lays a tax on domestic and foreign corporations chartered or authorized to do business in Texas, payable each year in advance and graduated according to the amount of capital stock, surplus and undivided profits, plus outstanding notes and bonds running for more than a year; or when business is done also in other States, on that proportion of the capital, etc., which the gross receipts from business done in Texas the previous year bears to the gross receipts from the entire business of the corporation. The calculation is made from a return under oath by the taxpayer. The law was analyzed and its general constitutionality as against the commerce clause and the Fourteenth Amendment declared in Southern Realty Co. vs. McCallum, 65 Fed. (2) 934, and its application to the circumstances of the eighteen complainants in that case was upheld. Certiorari was refused, 290 U. S. 692, and our interpretation of the law was indorsed by the State Court of Civil Appeals in United North & South Development Co. vs. Heath, 78 S. W. (2) 650. We said: "The tax is not laid on property or income, though both are regarded in measuring it. It is laid on the privilege granted to the corporation, whether domestic or foreign, to do business for one year in Texas with the capital set-up which it has chosen to use. The tax for this opportunity to do the year's business is directly measured by the business capital about to be used rather than by the income which it may afterwards appear was realized. The origin, form and location of that capital, whether in or out of the state, is unimportant, provided it is to contribute to the corporation's business power within the State. When the corporation is to do business in other States also, avoidance of a trespass on interstate commerce, or on that done beyond the territorial jurisdiction of the taxing State, is secured by apportioning the business potency of the corporation [fol. 58] represented by its business capital according to the business actually done the preceding calendar year in the taxing State as indicated by its gross receipts, compared

with its business everywhere." To this exposition of the law we adhere.

The appellant's real contention is that because it both manufactures and sells automobiles, the principal manufacturing activity and the capital necessary for it being in Michigan, gross income from sales is an arbitrary basis of apportionment in its case; and because the proportion of its capital investments located in Texas is far less than the proportion of its income there received, there is in effect a taxing of investments outside that State; and since the capital and investments outside the State are used largely in interstate business there is a burden on interstate commerce.

The facts pleaded are, broadly stated, that Ford Motor Company, a Delaware corporation, was engaged in manufacturing automobiles and tractors and the parts thereof principally in Michigan, its business domicile, where its largest investments in plant were and where its owned securities are said to be taxable, altogether about $500,000,000 worth out of a total of about $600,000,000. It sold some of its product in Michigan, and some of it in interstate and foreign commerce, but in large measure the parts for the machines were shipped to assembling plants in other States, and there put together, finished and tested, and sold locally. This was done in Texas. In 1935 the machines there finished and sold produced a gross income of $34,272,887. The receipts of the Company everywhere were $888,344,975. The Texas business was thus 3.858% of the whole. The Company's total capital set-up as defined by the statute was returned as $600,242,151, but the return stated: "Total capital actually located in or used in connection with busi- [fol. 59] ness done in Texas, $3,079,417." Taxes were tendered calculated on the latter figure. It is readily seen that 3.858% of the total capital is $23,157,705. The additional taxes demanded and paid on the latter basis constitute the matter in dispute. It thus appears that on the taxpayer's own figures, if the statute is applied according to its terms, there is no overpayment. But the protest stated and the petition alleges that the capital was invested and used in various ways. There were lands, buildings and machinery aggregating about $200,000,000. Inventories, cash, and accounts receivable (which may be considered working capital) aggregated some $250,000,000. There were United States and State and municipal securities put at $79,000,000,

and other smaller items. The investments returned as in Texas were about $1,168,000 in land and buildings; power plant $46,000; inventory, $1,012,000; accounts receivable $389,603, besides smaller items. Considering all the investments and their actual location it is argued that the formula of the Texas statute leads to absurd results, and that if a similar tax were levied in Michigan where sales are relatively small but where most of the assets are and most of the activity of the Company occurs, the result would be out of all fair proportion.

We do not think this argument controlling. This is not a tax on property. Each State, Michigan included, may tax all property having an actual or business situs therein. In addition each State in which this Company does business may exact an excise tax on that privilege. Texas has done so. The tax is non-discriminatory, applying alike to domestic and foreign corporations. It is not prohibitory, being in this case, without penalty, $7,247 on $34,272,000 of business done, or less than two ten-thousandths of one per cent. It is conceded that it might validly have been laid as a direct percentage on the business done. The objection is to the formula by which the tax is estimated. That it is gradu- [fol. 60] ated according to the capital strength of the corporation, which is its business potency, we held in the McCallum case to be not arbitrary. The holding is supported by the recent case of Great Atlantic & Pacific Tea Co. vs. Grosjean, 301 U. S. 412. When business is done also in other states, so that the business potency inherent in the capital is thus divided, it is not arbitrary to apportion the capital which is to measure the tax in proportion to the income realized in the taxing State. Nor do we think the fact that manufacture in another State of the thing sold renders the measure of the tax unreasonable. The object of the whole corporate enterprise is to make money. The corporation has made none by manufacture until it sells the product. If it chooses to sell in Texas, and extract cash from Texas, with the great advantage that manufacturing its own wares gives in competition with those who do not manufacture, it is not unreasonable to regard the potency of the capital used in manufacture as following proportionately the goods offered for sale in Texas. And it must be remembered that in this case part of the manufacture occurs in Texas. The machines are assembled and finished there. If it be prac-

ticable to separate the manufacturing from the selling activities, and the manufacturing activities in Texas from those elsewhere, this petition affords no data to do it. The value of the property as located in the several States would not be a reasonable basis of apportionment. Under such a basis this Company could manufacture wholly in another State, and sell its cars in Texas without any local investment and pay no tax there for the very valuable sales privilege. It is more reasonable to do as the Texas statute has done, to consider that in making sales and realizing income in Texas all the capital the seller has used in preparing the goods for sale has contributed to the result. The argument is made that a subsidiary corporation with but [fol. 61] little capital might be used to make the sales and thus limit the tax. In such a case the subsidiary might be held a mere agent to sell. But if that plan could be successful, it is no answer to the taxation of the parent company so long as it itself continues to sell its machines in Texas.

It is further argued that the United States bonds and stocks in foreign corporations owned by the taxpayer cannot reasonably be included in capital contributing to sales in Texas The presumption is that all the property of a business corporation is useful in its business. It should not have it otherwise. The Ford Motor Company has no business except the making and selling of cars. The securities can readily be used as a means of raising cash for working capital. What the foreign stocks are is not shown. If they have no relation to the business of making and selling cars the petitioner should have made the fact appear.

We find no basis for the contention that this tax on the privilege of doing a local business in Texas, measured in the way it is measured, taxes or otherwise burdens interstate commerce. For the more goods the taxpayer sells in interstate commerce, the less taxes it will owe in Texas.

Cases cited on the taxation of income such as Hans Rees Sons vs. North Carolina, 283 U. S. 123, are irrelevant. Wallace vs. Hines, 253 U. S. 66, would have been in point if the court had held the North Dakota excise tax law invalid in its general application. It held void only an exceptional phase of it which put upon railroads a peculiar method of mileage apportionment of capital between the States in which they did business, which was thought arbitrary. Had the apportionment for railroads been like that for other

corporations, on the basis of business done, as here, we apprehend the result would have been otherwise. Compare [fol. 62] Bass, Ratcliff & Gretton vs. State Tax Commission, 266 U. S. 271.

Judgment affirmed.

[fol. 63] JUDGMENT

Extract from the Minutes of December 15, 1938

No. 8664

FORD MOTOR COMPANY, a Corporation,

versus

EDWARD CLARK, Secretary of State of the State of Texas, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Ford Motor Company, a corporation, and the surety on the appeal bond herein, United States Guarantee Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 64] CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

UNITED STATE OF AMERICA:

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 55 to 63 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for

the Fifth Circuit, in a certain cause in said Court, numbered 8664, wherein Ford Motor Company, a corporation, is appellant, and Edward Clark, Secretary of State of the State of Texas, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 54 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in th Fifth Circuit, this 27th day of February, A. D. 1939.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 65] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 3, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 43,233. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 748. Ford Motor Company, Petitioner, vs. Edward Clark, Secretary of State of the State of Texas, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 15, 1939. Term No. 748, O. T., 1938.